No. 89-905

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

MUSCOGEE COUNTY SCHOOL DISTRICT, MUSCOGEE COUNTY BOARD OF EDUCATION, AND DR. BRAXTON A. NAIL, SUPERINTENDENT OF SCHOOLS FOR MUSCOGEE COUNTY,

Petitioners,

v.

PAIGE MITTEN, BY AND THROUGH HER FATHER AND NEXT FRIEND, ALAN MITTEN, AND ALAN MITTEN, INDIVIDUALLY,

Respondents.

BRIEF OF PAIGE MITTEN AND ALAN MITTEN AS RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported as *Mitten by and through Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989). It is also set out in the Petitioners' Appendix at App. 1-13. The order denying rehearing is unreported. The administrative decision of the Regional Hearing Officer of December 31, 1985 is in Petitioners' Appendix at 18-35, the State Hearing Officer decision is at Appendix 33-41, and the trial court opinion is at App. 14-17.

STATEMENT OF THE CASE

The Respondent Paige Mitten believes the Petitioners' Statement of the Case is misleading and finds it necessary to restate the case.

Paige Mitten, now thirteen, is a multiple handicapped child, who in addition to cerebral palsy, blindness, and lack of adequate speech and ambulatory skills has severe mental retardation. (App. 3; 18-19). The Mitten family moved from Texas to Georgia, being transferred by the military prior to the beginning of the 1985-86 school year. In Texas Paige had received public special education and related services under the Education For All Handicapped Children's Act of 1975, as amended, 20 U.S.C. §§ 1401 *et seq.* ("EHA"). Upon attempting to enroll their child in the Muscogee County School District they were denied services. (App. 22-3). Muscogee County did not write an individual educational program (IEP), as required by the EHA after the parents requested several

meetings. *See*, Fact Finding No. 4 at App. 22. In lieu of providing services or assuming responsibilities for services, they simply referred the student to a "day care center" run by the Georgia Department of Human Resources. *See*, O.C.G.A. ch. 37-6, Day Care Centers For The Mentally Retarded. That center did not use certified teachers, certified or licensed therapists, did not follow educational standards and as a matter of policy and practice did not follow Georgia's special education rules and regulations. *See*, Fact Finding No. 7 at App. 23; App. 30. The Muscogee County Petitioners expressly and directly refused to provide special education services or assure their provision as required under the EHA.

The 1985-86 school year began with Paige receiving no educational services under the EHA. The family therefore requested an administrative hearing (through counsel) under the EHA to adjudicate and correct Petitioners improper actions. The Petitioners initially refused to acknowledge the family's counsel's request for a hearing and no hearing officer was appointed. The result was additional delays in providing Paige appropriate educational services. Later the Petitioners agreed to provide related services personnel only, that is licensed therapists for a small portion of Paige's educational program but refused to comply with the placement requirements under the EHA or provide teachers. Still later, in the administrative hearings the Petitioners took the position that a contract between the Georgia Department of Education and the Georgia Department of Human Resources permitted this conduct. Contrary to Petitioners' assertion, this contract was not the first contract between these agencies but was simply a successor to contracts effect

since 1978, the first enforcement date of the EHA. *See*, 34 C.F.R. §§ 300.122, 300.124 and 300.600(b). The contract did not permit the actions taken as it expressly required that an IEP be written and that Paige receive special education services and not merely health or day care services. (App. 30-1).

The Petitioners belatedly permitted the appointment of a hearing officer and at the regional hearing Petitioners continued to assert that the contract permitted them to avoid writing an IEP, that they had no responsibility to provide trained and licensed teachers, and that none of the educational standards required under Federal and State education law applied once they decided to send Paige to a day care center. The family objected to the services at the center, asserting their right to a "free and appropriate public education" and also asserting that Paige should be in a school. The Regional Hearing Officer found that Paige's due process rights had been violated by the Petitioners due to their failure to permit a timely hearing, (App. 25), that Paige had a right to an IEP, (App. 26), that placement was improperly made prior to the writing of the IEP, (App. 26), that Paige had a right to licensed and certified teachers though finding that as long as educational standards were met in all regards, the location of Paige's educational program could be the training center. (App. 28-31). The "contract" defense of the Petitioners was rejected by the Hearing Officer. (App. 27-28).

The Petitioners, (and not the family), appealed this to the second stage administrative hearing under the EHA. The parents were forced to defend in that second forum

and did so successfully as the State Hearing Officer sustained the decision of the Regional Hearing Officer on all grounds. (App. 33-41).

After passage of the Handicapped Children's Protection Act of 1986, P.L. 99-372, 100 Stat. 796, 20 U.S.C. § 1415(e) *et seq.* ("HCPA"), the Georgia State Department of Education ruled that it would not permit parties to raise or seek attorneys fees in its administrative mechanism. (App. 4).[1] The family made a reasonable demand for compensation, and when this was denied they filed suit seeking attorneys fees under the HCPA in the United States District Court. In the litigation before the District Court, the decisions of the Hearing Officers were entered into evidence as well as the affidavit of Ms. Patricia Smith, counsel administratively for the Mitten family, the affidavit of Alan Mitten, and the family's discovery inquiries against the Petitioners. The Petitioners introduced only the family's responses to their discovery.

The trial court did not conduct an evidentiary hearing. There was never any introduction of evidence concerning the intent or objectives of the Mitten family in pursuing their hearing rights, except as reflected in their affidavit. There was no evidence whatsoever taken concerning Mr. Mitten's financial ability to support attorneys fees. The evidence as to his contract with his counsel reflected that he had been billed for fees and had paid his

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[1] This ruling occurred in *Lauren T. v. Crisp County*, SBE 1986-28, a copy of which was Exhibit D to the Respondents' complaint. A ruling of the State Hearing Officer is binding on all regional hearing officers in Georgia.

costs. The unrebutted evidence established that his objective in securing a hearing was to receive appropriate educational services for his child, and then later, correct the due process violation of the District. These were the two issues identified by the Regional Hearing Officer. (App. 21). The unrebutted affidavits of Mr. Mitten and Ms. Smith established that they had raised and prevailed on a number of claims. The family denied the Petitioners' Request for Admission that the "central issue" in bringing the litigation was only to move the student to another location for services. The Petitioners admitted that the family had prevailed on certain issues.

On March 11, 1988 the District Court denied the family relief. The Court without citing evidence in support of its position determined that the Respondents' "primary objective" was to have the child removed from the Department of Human Resources Center (App. 15), and then declined, in its "discretion", to award attorneys fees by ruling that the Petitioners had acted in accordance with a "recently enacted" contract and that the Respondents could afford to pay fees and did not pay any fees or costs. (App. 15-6). The Court then ruled that the family did not have a right to file their complaint for attorneys fees, relying upon *North Carolina Department of Transportation v. Crest*, 479 U.S. 6 (1986). (App. 16).

The Mitten family appealed this to the United States Court of Appeals for the Eleventh Circuit. During the course of the Court of Appeal's proceedings, this Court decided *Texas Teachers Association v. Garland Ind. Sch. Dist.*, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed. 2d 866 (1989) (*"Garland"*) unanimously overruling the "primary objective" standard for attorney's fees used in the Fifth and

Eleventh Circuit under 42 U.S.C. § 1988. While the Court of Appeals below did not cite *Garland*, the Court relied upon the legislative history of the HCPA which sets out the *Hensley v. Eckerhart*, 461 U.S. 424 (1984), "significant relief test" found that the Respondents had prevailed, (*Mitten*, 877 F.2d at 935, App. 7-8), and obtained significant relief as Paige was, through her administrative victory, provided an educational program, provided instruction by licensed teachers and had been denied her "free and appropriate public education" (*Mitten*, 877 F.2d at 936, App. 9-10). The Court of Appeals also rejected the assertion that a good faith but an erroneous position is a defense to attorneys fees. It held that this statute, like all fee statutes, does not require that fees be paid before the reimbursement is sought. (*Mitten*, 877 F.2d at 937, App. 10-11).

The Court of Appeals held consistent with the great body of the case law under the EHA, that the HCPA was intended to permit the recovery of administrative attorneys fees. (*Mitten*, 877 F.2d at 935, App. 6-7). The Court of Appeals addressed the "spending power" argument concerning the retroactive application of the HCPA, (which had been raised in a single page in the Petitioners' Brief), and rejected it holding that the HCPA was passed pursuant to § 5 of the Fourteenth Amendment, granting Congress power not analyzed in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) (*"Pennhurst I"*). (*Mitten*, 877 F.2d at 937-938, App. 11-13). It also found that the retroactivity of the HCPA was constitutional in this particular case, distinguishing its own decision in *Georgia Association for Retarded Citizens v. McDaniel*, 855 F.2d 805, 808 (11th Cir. 1988). *Ibid.* There it had held the

same section unconstitutional in the context of a case where a *prior* decision denying fees had been entered prior to the enactment of the HCPA. After denial of a motion for rehearing filed by the Petitioners below, they now petition this Court for the writ of certiorari.

SUMMARY OF ARGUMENT

The Petition should be denied because the Court of Appeals properly construed and applied the Handicapped Children's Protection Act of 1986, Pub. L. 99-372, 20 U.S.C. § 1415(e) to the factual circumstance in this case. Contrary to the position of the Petitioners there is no present conflict in the circuits as five circuits have ruled that attorney fees may be sought and recovered by families who prevail in administrative hearings under the Education For All Handicapped Children's Act of 1975, as amended, 20 U.S.C. §§ 1401 *et seq.* The single circuit to decide to the contrary has vacated its split decision and calendared the issue for en banc review.

The Petition also states that the standard for determining the "prevailing party" in a fee application should be whether the plaintiff prevailed on the "central or primary" relief sought. This Court resolved that question by rejecting that test for the *Hensley v. Eckerhart* formulation of "significant relief" on "any issue" last term in *Texas Teachers Association v. Garland Ind. Sch. Dist.*, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed 2d 886 (1989). Further, the Petitioners suggest that district courts inquire into a family's resources and ability to pay their attorney as a special circumstance to deny a compensatory fee award.

They ask this Court to review the Eleventh Circuit's rejection of their asserted good faith as a defense to attorney fees. These positions are without support in any decision of this Court or any Court of Appeals and should be rejected as irrelevant to the consideration of fee awards.

The Petitioners then suggest that the explicit retroactive provision of the HCPA, which is generally directed and limited in time to correct an error perceived by Congress in *Smith v. Robinson*, 468 U.S. 992 (1984) is unconstitutional under the spending power clause or the separation of power clause of the United States Constitution. Yet the Court of Appeals was correct in approving this legislation as rationally related to a legitimate governmental purpose and therefore as permissible legislation. Further, the law at issue is enacted, in part, under authority found in § 5 of the Fourteenth Amendment of the United States Constitution, which avoids the spending power argument raised by Petitioners.

The effect of the Court of Appeals decision is that the attorney fee act passed as an amendment to the special education laws is being uniformly enforced among the circuits. This enforcement is consistent with the terms of the act and the explicit intention of Congress to assure that families are made whole if they prevail in mandatory adjudicatory hearings to vindicate their disabled child's rights.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED, AS CONTRARY TO THE ASSERTION OF THE PETITIONERS, THERE IS NO SPLIT IN THE CIRCUITS ON THIS ISSUE. THIS RULING IS CONSISTENT WITH THE INTENT OF THE STATUTE, THE LEGISLATIVE HISTORY AND THE LANGUAGE OF THE STATUTE.

The Petitioners ask this Court to grant certiorari contending there is a split in the circuits, and alternatively, that the Court of Appeals improperly construed the statute to permit a party to receive an award of attorneys fees for administrative work. Neither of these two assertions are correct; nor do they support the granting of the petition.

A. There Is No Split In The Circuits.

The Eleventh Circuit Court of Appeals is joined by four (4) circuits in construing the HCPA to permit the initiation of an action to recover attorneys fees for time spent in administrative proceedings. These are *Duane M. v. Orleans Parish School Board*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullit County School Board*, 854 F.2d 892 (6th Cir. 1988); *Counsel v. Dow*, 849 F.2d 731 (2nd Cir. 1988), *cert. denied*, 489 U.S. ___, 109 S.Ct. 391, 102 L.Ed. 2d 380 (1988); *McSomebodies v. Burlington Elementary School District*, 886 F.2d 1559 (9th Cir. 1989).[2] *See also, Arons v. New Jersey*

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[2] In addition to *Moore v. District of Columbia* the Petitioners cite *Serafina v. San Mateo City School District et al.*;

(Continued on following page)

State Board of Education, 842 F.2d 58, 62 (3rd Cir. 1988) (dicta).

The Petitioners state that there is a split in the circuits based upon the District of Columbia panels' decision in *Moore v. District of Columbia*, 886 F.2d 1335 (D.C. Cir. 1989). That panel in a two-to-one opinion reversed the trial court's decision granting administrative attorneys fees, reported as *Moore v. District of Columbia*, 661 F.Supp. 263 (D.D.C. 1987). That Court's opinion has been vacated by the District of Columbia Circuit Court's grant of en banc review. *Moore v. District of Columbia*, No. 88-7003 (D.C. Cir., November 22, 1989). *See*, Handbook of Practice and Internal Operating Procedures and Rules, D.C. Circuit, August 1, 1987 at XII, (B)(2). Thus there is no split in the circuits which would qualify this case for review under Rule 17 (1)(a) of the Rules of the Supreme Court.

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C-88-0799(JPO) (N.D. Cal. 1989) and *McCormack v. Burlington Elementary School District*, C-88-0141(JPO) (N.D. Cal. 1988). These cases have been reversed by the Ninth Circuit in *McSomebodies v. Burlington Elementary School District*, 886 F.2d 335 (9th Cir. 1989). The only other HCPA case cited by Petitioners is *Rollison v. Biggs*, 660 F.Supp. 875 (D.Del. 1987), which is contrary to the dicta in *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62 (3rd Cir. 1988) and which misapplies a single reference in the HCPA's legislative history. *See, Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F.Supp. 921 (N.D. Cal. 1987.)

B. The Eleventh Circuit Court of Appeals Properly Ruled That The HCPA Grants A Claim For Administrative Fees.

The Court of Appeals held that the use of the word "proceeding" in the HCPA was an explicit reference to the administrative proceedings mandatory under the EHA, and that therefore there was a claim in the district court for costs and fees. (*Mitten*, 877 F.2d at 935, App. 6-7). This is consistent with the use of the phrase "proceeding" throughout 20 U.S.C. § 1415, including other references within subsection (e). *See, Unified Sch. Dist. No. 259 v. Newton*, 673 F.Supp. 418, 420 (D.Kan. 1987); *Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F.Supp. 921, 923 (N.D. Cal. 1987); *Williams v. Boston School Committee*, 709 F.Supp. 27 (D.Mass. 1989).

The Petitioners suggest that the Court of Appeal's failure to distinguish *North Carolina Dept. of Transportation v. Crest Street Community Council*, 479 U.S. 6 (1986) (*"Crest Street"*) also requires granting of the writ. They must rely on the *Crest Street's* disapproval of dicta from *New York Gas Light Club v. Carey*, 447 U.S. 54 (1980) (*"Carey"*) regarding 42 U.S.C. § 2000e-5(k) attorney fees, when applied to 42 U.S.C. § 1988 situations. This misperceives the HCPA's reliance on *Carey*, and the intentional structural similarities between the EHA and Title VII of the 1964 Civil Right's Act, 42 U.S.C. § 2000e, through their mandatory administrative mechanisms.

In *Crest Street* the litigants had participated in elective administrative proceedings under environmental protection statutes. They then attempted to intervene in a federal proceeding over those issues, under which there

was no right to fees and raise Title VI claims under the 1964 Civil Rights Act, 42 U.S.C. § 2000d. The administrative case was resolved prior to a ruling on the motion to intervene and the district court dismissed the motion. The would-be intervenors then filed an independent action for fees, alleging that they had prevailed administratively on claims that were precursors to their Title VI complaint. This Court held that Title VI did not require administrative proceedings, that the proceeding in which they may have prevailed was not one of the civil rights "proceedings" enumerated under § 1988, and that therefore an independent action for fees was not available. The *Crest Street* opinion relied on legislative history of that fee statute, 42 U.S.C. § 1988, which appeared to limit its application only to court actions. *See, Eggers*, 854 F.2d at 895-6, *citing Crest Street*.

This case is substantially different due to the intended difference in the EHA/HCPA. Here the fees arise directly from the same proceeding between the parties, after the Mittens' final success in the administrative mechanism. This, unlike *Crest Street*, is not a collateral attempt to gain a fee award. *Duane M.*, 861 F.2d at 118. The EHA is also much more like Title VII than Title VI. Here mandatory hearings adjudicate and resolve disputes between litigants. These force families into retaining counsel, preparing and presenting witnesses and evidence, and rigid procedural restrictions, including administrative appeals. In this process parents may be partially successful but appeal the case based upon issues they lost to the district court. If they then fully prevail they would have a right to compensation for time spent in the administrative proceeding as long as the time met

the test of *Webb v. Dyer County Board of Education*, 471 U.S. 234, 243 (1985) as necessarily related and useful to their ultimate success. Other parents, like the Mittens, may be entirely successful in the administrative trial and not need to seek district court review. Thus, under the HCPA, like Title VII:

> It would be anomalous to award fees to the complaintant who was unsuccessful or only partially successful in obtaining state and local remedies but to deny an award to the complaintant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

Carey, 447 U.S. at 62-63. The legislative history of the HCPA shows that the "sponsors and legislative committee members agreed to provide complete reimbursement for the entire expenses incurred in both the mandatory administrative proceeding and the later court action." Schreck, "Attorney's Fees For Administrative Proceedings Under The Education Of The Handicapped Act: Of *Carey, Crest Street* And Congressional Intent", 60 Temple Law Quarterly 599, 650 (1987). The intent of Congress is articulated explicitly at each step of its consideration. *E.g.*, S. Rep. 99-112, 99th Cong., 1st Sess., (1985) at 7-8; H. Rep. 99-296, 99th Cong., 1st Sess., (1985) at 5; and H. Cong. Rep. 99-687, *reprinted in part*, U.S. Cong. & Admin. News, 99th Cong., 2nd Sess., 1799, 1807-1810 (1986). "In short, in floor debates over two years and in various legislative reports, both houses of Congress unambiguously assented to attorneys' fees for work done solely at the administrative level." *Unified School Dist. No. 259 v. Newton*, 673 F.Supp. 418, 422 (D.Kan. 1987). *See discussion, Eggers*, 854 F.2d at 895-898; *Duane M.*, 861 F.2d

at 118-119; *Chang v. Board of Educ. of Glen Ridge TP.*, 685 F.Supp. 96, 98-100 (D. N.J. 1988); *Mathern v. Campbell County Children's Center*, 674 F.Supp. 816, 818 (D. Wyo. 1987). In summary *Crest Street* is not authority to deny the Mittens' claim for costs and fees expended. They had to initiate a "proceeding" to adjudicate their rights and the district court therefore is authorized under the HCPA to see to their reasonable compensation.

II. THE PETITIONERS ASSERTION THAT THE ELEVENTH CIRCUIT COURT OF APPEALS USED THE WRONG LEGAL STANDARD TO DETERMINE WHETHER THE FAMILY HAD PREVAILED, I.E., HOLDING RESPONDENTS HAD OBTAINED SUBSTANTIAL RELIEF INSTEAD OF UTILIZING A "CENTRAL ISSUE" TEST IS WITHOUT MERIT. THE COURT OF APPEALS PROPERLY APPLIED THE *HENSLEY v. ECKERHART* STANDARD.

The Petitioners ask this Court to grant review as they believe the Court of Appeals applied the wrong standard for entitlement to fees. They assert that the Court of Appeals should have used a "primary/central issues" test to determine whether the Respondents had broken the threshold to become prevailing parties for the purposes of an entitlement to attorneys fees. This is without merit based upon this Court's holding in *Texas State Teacher Association v. Garland Independent School District*, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed 2d 866 (1989). Further, to the extent it relies upon an erroneous construction of the relief granted in the administrative hearing, the Court of Appeals was correct in reversing.

A. The Standard Of Review Is The *Hensley v. Eckerhart* Standard of Substantial Relief.

The trial court without citation found that the Respondents were not prevailing parties as they had not been successful in their "primary objective". *See*, Trial Court Order at 2, App. 15. As noted above the Petitioners did not put forth any evidence to support their version of the family's "primary objective". The family attacked this on appeal as utilizing an improper standard and as clearly erroneous.

Respondents concede that prior to last term the Fifth and Eleventh Circuits had used a confusing "primary relief" test under 42 U.S.C. § 1988. *See, e.g., Wilson v. Attaway*, 757 F.2d 1227, 1248 (11th Cir. 1985), *Miami Herald Publishing Company v. City of Hallandale*, 742 F.2d 590 (11th Cir. 1984). Yet even in the Eleventh Circuit some courts had backed away and avoided articulating the standard as a "central issue" or "primary relief" test, going instead straight to *Hensley*'s "substantial relief" formulation. *E.g., Odum v. Clark*, 748 F.2d 1538 (11th Cir. 1984); *Popham v. City of Kennessaw*, 820 F.2d 1570 (11th Cir. 1987), *citing, e.g., Hensley* and *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978).

In response to this status of the law, the family below asked the Eleventh Circuit to recognize that the HCPA used the significant relief test as a matter of statutory construction, or alternatively, invited that court to overturn the "primary/central issue" paradigm. The family argued below that Congress had clearly intended that the *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("*Hensley*") standard of "substantial relief" be utilized under the

HCPA. They cited the extensive legislative history of the act, expressly setting out and incorporating the *Hensley* standards. *E.g.*, H.Rep. 99-296, 99th Cong., 1st Sess. (1985) at 5-6. The court below chose to apply the *Hensley* test of substantial relief to the HCPA. (*Mitten*, 877 F.2d at 936, App. 8-9).

This Court in *Garland* addressed the "primary relief/central issue" standard and held that the "'central issue' test was directly contrary to the thrust of (the) decision in *Hensley*". *Id.*, 103 L.Ed 2d at 876. The proper threshold for fees is whether the plaintiff succeeds on "any significant claim affording (them) some of the relief sought". *Ibid.* This Court went on to state that the central issue test creates a subjective problem that is almost impossible for the judiciary to answer, that is, what was the primary relief in the minds of the plaintiffs when they filed their litigation. *Ibid.* The Petitioners ignored *Garland* below and in their petition. The suggestion that this Court should grant review to correct the Eleventh Circuit's failure to utilize the "primary relief/central issue" test is meritless.

B. The Plaintiffs Prevailed On A Significant Issue In The Litigation And Obtained Some Of The Relief They Sought.

As the Respondents demonstrate in the statement of the case, the administrative hearing in this case was sought because Paige Mitten was not in school, had no IEP and the school district was taking the position that they had no duty to provide services for her at all. Later, the Petitioners refused to initiate due process procedures. During the course of the administrative proceedings and

later by virtue of the administrative order, Paige Mitten earned a right to special education services, gained a hearing and a declaratory decision that the District had acted improperly in denying a hearing request, and also gained a right to have all of her services protected under EHA standards. She won the right to certified teachers and EHA standards for her services. She did not directly prevail on one issue, which was where the services should be located. Faced with the Regional Hearing Officer's decision, the Petitioners, not Paige Mitten, appealed to the State Hearing Officer. The State Hearing Officer rejected their appeal and affirmed the Regional Hearing Officer.

In the District Court, the family introduced uncontroverted affidavits addressing their "primary issue". These stated that the objective of the litigation was to secure Paige her "FAPE", 20 U.S.C. § 1401(18), through an IEP and a proper school program. This was the same issue identified by the hearing officer. (App. 21). The family denied the Petitioners' discovery request that they had lost the primary issue claim; the Petitioners admitted in discovery that the family had prevailed on certain issues. The Petitioners introduced no other evidence but nevertheless argued in the trial court, on appeal and now before this Court, that they somehow knew what the "primary issue" had been and that they had won the litigation.

On this evidentiary record the trial judge inexplicably concluded that the family's "primary issue" had been to remove their child from a training center. The Eleventh Circuit Court of Appeals properly reversed this holding. (*Mitten*, 877 F.2d at 936, App. 8-9). First it is clear that the

child obtained significant relief in that she obtained special education and related services that are appropriate to her under the EHA. In this regard one need only rely on the clear holdings of both administrative hearing officers. These in part provide:

> In review of the above findings and the evidence considered my decision is that:
>
> (1) The Muscogee County School District violated the time lines by not scheduling a due process hearing within twenty days from the receipt of the official notice from the parents' attorney; and,
>
> (2) That the Muscogee County School District failed to provide the child a free and appropriate education in that it failed to develop and implement an IEP for the child prior to October 23, 1985.

Decision of the Regional Hearing Officer, App. 31-2. The State Hearing Officer's decision states:

> The Regional Hearing Officer decided that the Local System violated the time lines by not scheduling a due process hearing within twenty days after receipt of the official notice from the parents' attorney. The Regional Hearing Officer also decided that Local System failed to provide a free, appropriate public education because:
>
> (1) it failed to develop an IEP for the student prior to October 23, 1985; and,
>
> (2) the placement is not consistent with the regulations which require the student to be provided in education which meets the standards of the state educational agency . . .

Decision of State Hearing Officer, App. 34. The State Hearing Officer at Part IV of his decision then concluded:

> Based upon the foregoing discussion, the record presented and the briefs and arguments of counsel, the state hearing officer is of the opinion that the local board failed to demonstrate and offer the student an appropriate program and that the local board was responsible for violating the time lines when it failed to request a hearing upon the request of the parents' counsel.
>
> The decision of the regional hearing officer, to the extent it is consistent with this decision is hereby
>
> Sustained.

Decision of State Hearing Officer, App. 41. Thus the conclusion of the Court of Appeals is correct. The improper conduct of the Petitioners terminated to the benefit of the child, *see, Hewitt v. Helms*, 482 U.S. 757, 761 (1987); *Rhodes v. Stewart*, 488 U.S. ___, 109 S.Ct. ___, 102 L.Ed 2d 1 (1989), and Respondents have therefore "prevailed". The Petitioners continued colorization of their actions is dilatory if not frivolous.

III. THERE ARE NO SPECIAL CIRCUMSTANCES WHICH EXIST TO DENY THIS FAMILY A RIGHT TO ATTORNEYS FEES.

The Petitioners at Question III assert that their actions in denying services to this severely mentally retarded student were somehow justified by an agreement between several branches of state government. Alternatively, in this section they assert that the family had the ability to pay for legal services and therefore they now have no right to reimbursement for the cost of securing their child's statutory (and constitutional)

rights. Under the holdings of this Court and virtually every lower court which has addressed the issues, Respondents are entitled to an award of attorneys fees unless there are special circumstances making such an award unjust. *See, Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 417 (1978); *Concerned Democrats of Florida v. Reno*, 601 F.2d 891 (11th Cir. 1979); *Morrow v. Stewart*, 580 F.2d 1284, 1300 (5th Cir. 1978). If special circumstances exist the burden of establishing that rests on the party opposing fees. *E.g., Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 611 (7th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983). Further, the circuits have uniformly held under related attorneys fees bills that good faith is not a defense to the entitlement of the plaintiff as a prevailing party and not a special circumstance sufficient to deny recovery. *E.g., Espino v. Besteiro*, 708 F.2d 1002, 1005-6 (5th Cir. 1983); *Burke v. Guiney*, 700 F.2d 767, 772 (1st Cir. 1983); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985). *See also, Fontenot v. Louisiana Bd. of Elem. and Second. Educ.*, 835 F.2d 117, 120 (5th Cir. 1988) (HCPA case).

In addition, the factual assertion of the Petitioners that their illegal conduct was simply the enforcement of a contract between two branches of State government was rejected by the Regional Hearing Officer and by the State Hearing Officer. (App. 27-8 and App. 37-8). Both found that the so called "pact" between the several state agencies did not permit or condone the denial of rights which should be afforded Paige Mitten. The final construction of the "pact" was that it could not waive or terminate the student's rights. It was therefore enforced against the

position of the Petitioners and this "special circumstance" never factually arose.

On the next issue, the Petitioners in the trial court, in the circuit court, and again before this Court continue to state that Paige Mitten had the "ability to pay" for the legal services and/or that these had never been billed to her family. First, there was no evidence whatsoever to support this assertion. The only evidence submitted explicitly stated that the family had been billed for the legal services and that the family had paid the costs. The unrebutted evidence reflected that the family remained liable for the attorneys fees. The ruling of the trial court cited no evidence supporting the conclusion that the family had the ability to pay.

The threshold entitlement is whether the family "prevailed". A family's ability to pay attorneys for helping them secure statutorily protected rights is irrelevant to any consideration of entitlement to fees. (*Mitten*, 877 F.2d at 937, App. 10.) The economic status of the family is not and should not be before any court. It would create differential justice: One standard of law for those with the funds to vindicate their rights and a second standard of law for those with less funds. One also can only ponder how a court would determine whether the family could pay. Do families with large expenses in caring for handicapped students have to earn more than others? Certainly no family, no matter how wealthy, anticipates that they will have to initiate litigation to have their child afforded a public education. How much should a family make to deny them an award? When the Petitioners appealed and subjected this family to additional costs and fees, when would the Mittens become financially

unable to further support the litigation? If the case went on could a family become financially unable to pay when their resources were exhausted, and if so, would their entitlement begin from that point in time or relate back? If, as this Court held in *Garland*, a trial court should not inquire into the "primary" objective of the family, it is even more egregious to suggest that trial courts should make case by case determinations about a family's ability to pay their lawyer in order to entitle that family to reimbursement for the cost of vindicating rights.

The Respondents believe this Court has implicitly rejected the question of payment in *Blum v. Stenson*, 465 U.S. 886 (1984) where the ability to charge clients was determined irrelevant to whether the plaintiffs had prevailed and can collect fees. Similarly in *Hutto v. Finney*, 437 U.S. 678 (1978) this Court permitted an award and collection of compensatory attorneys fees where attorneys fees had been initially paid by a third party. The Court of Appeals below and its predecessor, the Fifth Circuit Court of Appeals and the other circuits which have addressed this issue have uniformly rejected as being outside the rubric of "special circumstances" any consideration of a plaintiff's financial ability to pay. *See, e.g., International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980); *Gore v. Turner*, 563 F.2d 159, 163-4 (5th Cir. 1977); *Leonard v. Argento*, 699 F.2d 874, 900 (7th Cir. 1982), *cert. denied*, 464 U.S. 815 (1983). *Cf. Eggers*, 854 F.2d at 898-900 (Fees may be awarded to public agency). There is no reason for reviewing or upsetting the decision below on these grounds.

IV. THE IMPLEMENTATION DATE OF THE HCPA GRANTING A RIGHT TO ATTORNEY'S FEES FOR THE LIMITED NUMBER OF CASES RESOLVED BETWEEN *SMITH V. ROBINSON* AND THE ENACTMENT OF THE HCPA IN AUGUST OF 1986 DOES NOT VIOLATE THE SPENDING POWER CLAUSE OR THE SEPARATION OF POWERS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The trial court in this case never reached the issue whether or not the HCPA by its retroactive application violates the spending power clause or the separation of powers clause of the United States Constitution. The Petitioners raised this claim in a single page of their responsive brief before the Eleventh Circuit. The Court of Appeals reached the issue and upheld the constitutionality of the law. A similar conclusion has been reached by the other Courts of Appeals which have addressed the issue. *E.g., Counsel v. Dow*, 849 F.2d at 737-739. Moreover, the Eleventh Circuit has been particularly sensitive to these issues, denying retroactive attorneys fees in an earlier case where it viewed a prior judgment on fees rendered after *Smith v. Robinson*, 468 U.S. 992 (1984) as requiring dismissal of a new petition under the HCPA. *See, Georgia Association for Retarded Citizens v. McDaniel*, 855 F.2d 805, 808 (11th Cir. 1988), *cert. denied*, 489 U.S. ___, 109 S.Ct. 2431 (1989).

The HCPA at § 5 expressly makes it retroactive to cases pending before *Smith v. Robinson* or decided after *Smith v. Robinson* but prior to the enactment date. The analysis of retroactivity raises a due process question and the "burden is on the one complaining of the due process

violation to establish that the legislature has acted in an arbitrary and irrational way". *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1, 3 (1976) (hereinafter "*Elkhorn*"). *See, Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717 (1984) (hereinafter "*Gray*"). *See also, Counsel v. Dow*, 849 F.2d at 739-738, *Tonya K. By Diane K. v. Bd. of Educ. of Chicago*, 847 F.2d 1243 (7th Cir. 1988). (HCPA cases). *See Discussion*, Hockman, "The Supreme Court and the Constitutionality of Retroactive Legislation", 73 Harv. L.Rev. 692, 719 (1960). This analysis has never been addressed or distinguished by the Petitioners. Applying the test, it is clear that the HCPA was legislation which was intentionally retroactive, was curative and is rationally related to a legitimate government purpose, and therefore withstands constitutional challenge.

In *Gray* a bill was passed to amend Title IV of the Employment Retirement Income Security Act, 29 U.S.C. §§ 1301 *et seq.*, ("ERISA") because one of ERISA's problems was that it encouraged withdrawals from multiemployee plans. Pub.L. 96-364, 94 Stat. 1208. Congress made that amendment retroactive because it was "properly concerned that the employees would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability in withdrawing was being considered". *Gray*, 467 U.S. at 730. The *Gray* court relied on the earlier decision in *Elkhorn*. There twenty coal mine operators had challenged part of the Black Lungs Benefits Act of 1972, 30 U.S.C. §§ 901 *et seq.*, on the grounds that it offended due process because its retroactive provisions required operators to compensate workers who no longer worked in the industry. This Court deferred that decision to Congress and held that

the due process clause poses no bar to such compensation. *Id.* 428 U.S. at 19-20. The *Gray* opinion was also cited with approval in *United States v. Darusmont*, 449 U.S. 292 (1981) (per curiam), a decision upholding a retroactively imposed income tax. There this Court stated:

> This retroactive application has apparently been confined to short and limited periods required by the practicalities of producing national legislation. We may safely say that it is a customary congressional practice.

Darusmont, 449 U.S. at 296-297. Since *Gray* this Court also upheld retroactive application of the Federal Land Policy and Management Act, 43 U.S.C. § 1701, Pub. L. 94-579, 90 Stat. 2743, even though some individuals lost mining rights they thought they had owned in *United States v. Locke*, 471 U.S. 84 (1983). *See also, Temple University v. United States*, 769 F.2d 126 (3rd Cir. 1985); *Brown v. McGarr*, 774 F.2d 777, 782-4 (7th Cir. 1985); and *Jones v. Reagan*, 748 F.2d 1331, 1339 (9th Cir. 1984).

Even the cases Petitioners cite on retroactivity do not support their position. *United States v. Sioux Nation of Indians*, 44 U.S. at 371 (1980) does not prohibit all retroactive legislation but involved a case where the Government renewed claims (extended retroactive liability against itself) and this Court determined that that was permissible legislation. One of the tests which emerged from the Sioux Indian cases is that there is no due process or separation of powers concern if the legislation is general, that is, if it is not directed to individuals as an attempt to create or reverse a particular result. Thus courts have relied upon the general application of the

HCPA to support its constitutionality. *E.g., Capello v. District of Columbia Board of Education,* 669 F.Supp. 14 (D.D.C. 1987). In summary, as the general retroactive provision relates to a limited number of cases in a two-year window and it is rationally related to legitimate governmental purposes as curative legislation designed at protecting families under the EHA, it is permissible legislation. The retroactivity challenge does not support the granting of the writ.

The Petitioners also suggest that liability in this case would impair their contractual obligations in violation of *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981) (*"Pennhurst I"*). Again, this is an issue which was not addressed by the trial court but rejected by the Court of Appeals when raised by Petitioners. Petitioners have never distinguished any of the HCPA cases which hold directly against them on these issues. *E.g., Counsel,* 849 F.2d at 735-6; *Sch. Bd. of Prince William County v. Malone,* 662 F.Supp. 999, 1000 (E.D. Va. 1987); *Unified School District No. 259 v. Newton,* 673 F.Supp. 418 (D. Kan. 1987).

Petitioners' argument does not acknowledge that the EHA and the HCPA were passed in part due to Congress' power under the Fourteenth Amendment creating substantive rights. *See, Honig v. Doe,* 488 U.S. ___, 108 S.Ct. 592, 98 L.Ed. 2d 686 (1988). Therefore fee obligations are a proper exercise of authority irrespective of the spending power analysis in *Pennhurst I.* Petitioners also ignore the fact that the fee obligation is clear and unambiguous, and therefore the spending power authority is not infringed under *Pennhurst I.*

Pennhurst I held that the Developmentally Disabled Bill of Rights Act, 42 U.S.C. § 6010 created no substantive rights and that Congress acting only pursuant to the spending clause could not impose financial burdens on the states in exchange for federal funds unless it did so unambiguously. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), *Smith v. Robinson*, 468 U.S. 992 (1984) and *Honig v. Doe*, 488 U.S. ___, 108 S. Ct. 592, 98 L.Ed. 2d 686 (1988) this Court has held that the EHA protects substantive and specific rights. *See also, Manacke v. School Board of Pinnelas County, Fl.*, 762 F.2d 912, 918 n.6 (11th Cir. 1985), and *Fontenot v. La. Bd. of Elem. and Second Ed.*, 835 F.2d 117 (5th Cir. 1988). Thus once it is clear that the exercise of Congress' power was to protect rights or that the legislation was enacted under the Fourteenth Amendment, the *Pennhurst I* argument falls. *See generally, Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-7 (1976); *Jones v. City of Lubbock*, 727 F.2d 364, 374 (5th Cir. 1984). Under § 5, Congress has authority to impose attorneys fees obligations, *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1973), and these duties may be imposed retroactively, *Hutto v. Finney*, 437 U.S. 678 (1977). *Accord, Counsel v. Dow; United School District No. 259 v. Newton*, 673 F.Supp. 418, 423-4 (D.Kan. 1987); *Barbara R. v. Tirozzi*, 665 F.Supp. 141 (D.Conn. 1987); *Turton v. Crisp County Sch. Dist.*, 688 F.Supp. 1535, 1538-9 (M.D. Ga. 1988); *Yaris v. Special Sch. Dist.*, 661 F.Supp. 996, 1001 (E.D. Mo. 1987) (HCPA cases). Thus these grounds are not a basis for granting the writ sought by the Petitioners.

The Petitioners' argument also overstates *Pennhurst I*. There this Court held that the spending power clause could extend obligations but it must do so clearly and

unambiguously. *Pennhurst I*, 451 U.S. at 147. The HCPA expressly makes itself retroactive and therefore does not cross the *Pennhurst I* limitation. *See, e.g., Mitten*, 877 F.2d at 937, App. 12; *Counsel v. Dow.*

CONCLUSION

The Petitioners have not demonstrated any grounds for the granting of the writ. There is no division of authority between the circuits and the great weight of the case law is with the Court of Appeals. The statutory construction of the HCPA below has ample support in the plain wording of the act, as reinforced by the legislative history of this curative legislation. The question of the test for "prevailing parties" was resolved adverse to Petitioners last term in a case the petition ignores. A plaintiff's "ability to pay" an attorney should not be a special circumstance denying entitlement to fees. Finally, the HCPA is constitutional legislation and the Petitioners have not demonstrated any credible argument to the

contrary. The Respondents ask this Court to deny the Petition for the Writ of Certiorari.

Respectfully submitted,

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